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HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 443

GUY E. FOSTER, ET AL.,

Appellants

v.

EMORY BAY, ET AL.,

Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Appellees Robert S. Calvert, Jesse James and Allan Shivers, members of the State Automatic Tax Board, and Brazoria, Brazos, Fort Bend, Milam and fifty other Texas counties, respectfully file this statement in opposition to appellants' statement contending that this Court has jurisdiction upon appeal to review the judgment heretofore rendered in this cause by the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Appellees include herein their motions to dismiss the appeal or, in the alternative, to affirm the judgment of the

Court of Civil Appeals. Both motions are based on appellees' conviction that the equal protection question urged by appellants as the only ground for reversal needs no further argument because it has been plainly foreclosed and determined against appellants by prior decisions of this Court.

The Question Presented

May the Texas Legislature, consistent with the equal protection of the law guaranteed by the Fourteenth Amendment, define a taxing district composed of Grimes and nine adjacent counties which had previously suffered most from floods on the Brazos River and authorize taxation in those counties only for the support of flood control works projected, supervised and coordinated by a master district embracing the entire watershed?

The Federal Question Is Unsubstantial

For more than seventy years this Court has uniformly held that when public works are authorized by state law it is for the state legislature to determine the manner of financing such improvements, and that where the improvements are comparable in scope to those built and projected by the Brazos River Conservation and Reclamation District the state legislature "may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure." See *County of Mobile* v. *Kimball*, 102 U. S. 691, 703 (1880).

When (as in the present case) a state legislature has taken the latter course, has designated or defined a lesser area than the whole state and has placed the entire financial burden thereon, this Court has consistently rejected taxpayers' complaints based on the Equal Protection Clause

except in very rare instances when the record so clearly disproved special benefit to the defined area that the legislature's action could be characterized as "palpably arbitrary and a plain abuse" of legislative power. *Houck* v. *Little River Dist.*, 239 U. S. 254, 262 (1915).

The decisions which most clearly foreclose the question raised by appellants are: *Chesebro* v. *Los Angeles County Dist.*, 306 U. S. 459 (1939); *Memphis & C. Ry.* v. *Pace*, 282 U. S. 241 (1931); *Kansas C. S. Ry.* v. *Road Impr. Dist. No. 3*, 266 U. S. 379 (1924); *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155 (1923); *Mt. St. Mary's Cemetery Ass'n* v. *Mullins*, 248 U. S. 501 (1919). See also the decisions referred to and relied upon by the Court of Civil Appeals.[1]

These decisions show that equal protection arguments founded on matters of unusual form or unusual language in the state legislation complained of, though frequently advanced, have not met with success in this Court. As stated in the *Chesebro* opinion:

> ". . . where, within the scope of its power, the legislature itself has found that the lands included in the district will be specially benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive. . . .
>
> "The legislature need not adopt any form of statement or finding for, in the enforcement of restraints imposed by the federal constitution upon the power of states to assess and collect taxes, this Court regards the *substance* of their enactments as controlling rather than mere forms of expression employed." (306 U. S. at 464) (Emphasis added throughout this Statement).

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[1] *County of Mobile* v. *Kimball*, 102 U.S. 691 (1880); *Hagar* v. *Reclamation Dist.*, 111 U.S. 701 (1884); *Spencer* v. *Merchant*, 125 U.S. 345 (1888); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896); *Williams* v. *Eggleston*, 170 U.S. 304 (1897); *Miller & Lux, Inc.* v. *Sacramento & San Juaquin Drainage Dist.*, 256 U.S. 129 (1921).

The substance of the Texas legislation authorizing collection of the challenged 30¢ per $100 valuation tax in Grimes County, until the outstanding obligations of the Brazos District are retired in 1957, is identical in effect with the substance of the various legislative acts heretofore sustained as against Equal Protection Clause arguments in the line of cases of which the above are representative. In each such case a defined geographical unit or subdivision of the state was set apart by legislative action authorizing special, unique and non-uniform tax treatment in the designated area specially benefited by the public improvements to which the tax proceeds were devoted. In the present case the Texas Legislature, by the joint resolution authorizing submission of Article VIII, Section 1-a to the people and by the enabling act now challenged,[2] effectively defined an area composed of Grimes and nine adjacent counties grouped at the mouth of the Brazos River and authorized therein special, unique and non-uniform taxation (by means of a convenient, then-existing levy procedure). Likewise, the Texas Legislature by the legislation now challenged unequivocally devoted the proceeds of such special levies to public improvements by the Brazos District which improvements had long before been found by the Legislature to be "the only practical and legal means"[3] for relieving these counties of "recurrent, devastating floods."[4]

The decisions of this Court referred to previously make one other point which is pertinent here. They emphasize

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[2] H.J.R. No. 24, Acts 50th Leg., 1947, p. 1190; Acts 51st Leg., R.S. 1949, ch. 464, § 10(a), now codified as Article 7048a, Vernon's Annotated Civil Statutes of Texas.

[3] Acts 44th Leg., R.S. 1935, ch. 19, § 3(a). This act and most of the other earlier legislation concerning the Brazos District is collected in a note following Article 8197f, Vernon's Annotated Civil Statutes of Texas, Vol. 21, page 536, et seq.

[4] Acts 44th Leg., 1st C.S. 1935, ch. 368, § 5.

that taxpayers who would successfully challenge a legislative classification as not being reasonably related to flood control or to any other object or purpose must do more than simply argue general principles and "submit" that the legislature's classification is "palpably arbitrary and a plain abuse." In cases involving public improvements this Court requires that complaining taxpayers *prove* beyond all doubt by competent evidence that express or implied legislative fact findings of special benefit are arbitrary. The present record is utterly deficient in this regard. From a factual standpoint it proves only that appellants Foster, Franklow and Hall own land in Grimes County, some of which is outside the watershed of the Brazos River.[5]

Moreover, aside from appellants' failure to offer any proof pertaining to the receipt or non-receipt by Grimes County of special benefits from the public improvements undertaken by the Brazos District, there is in this case an independent factor which precluded any effective disproving of special benefits to Grimes County even if that burden had been undertaken. For, as disclosed by the opinion of the Court of Civil Appeals, the Supreme Court of Texas in *Brazos River Conservation and Reclamation Dist.* v. *McCraw*, 126 Tex. 506, 91 S. W. 2d 665 (1936), in holding that "the existence of this river uncontrolled is a continuing public calamity" within the meaning of Article III, Section 51 of the Texas Constitution, necessarily considered the identical factual criteria which control the issue of special benefits *vel non* to Grimes County from a coordinated and comprehensive system of stream regulation. That state court decision predetermined the merits of the federal question now raised by appellants.

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[5] Indeed, nothing whatever was proved as to appellant Dyer nor as to any other taxpayer in Grimes or in other remission counties. Thus, while plead and argued here as if it were a class action, in reality this is an appeal by three taxpayers who represent only themselves.

Factual criteria then before the Texas Supreme Court—including numerous legislative fact findings as well as the agreed and judicially-known physical facts and flood history—fully sustained its general holding that a public calamity existed as well as its conclusion in support thereof that:

> "The principal damage from overflows by the Brazos River lies south and southeast of Waco. The counties *suffering most* from this cause are shown [on an attached map] in shaded portions or in colors along the lower reaches of the Brazos, beginning with Milam and Robertson Counties and extending to the Gulf of Mexico [including Grimes] . . ." (126 Tex. at 513, 91 S. W. 2d at 669).

Appellees submit that an inescapable corollary of this holding is that the same ten counties, including Grimes, which had "suffered most" from the calamity would benefit most from the flood control works constructed by the Brazos District. The ten counties which had sustained "the principal damage" from floods would inevitably be the counties specially, immediately and mainly benefited by flood control.[6]

Further Argument Is Unnecessary

In addition to the lack of substance in this appeal which is shown by the decisions already referred to, appellees submit that the following decisions (either dismissing "for want of a substantial federal question" or affirming because the question raised is "so wanting in substance as not to need further argument") are entirely sufficient in themselves to show that further argument of this appeal is unnecessary. All of the present appellants' serious arguments were presented and rejected in these cases. *Big Slough*

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[6] Prevention of the "recurrent, devastating floods in the valley of the Brazos River" is the declared primary purpose of the Brazos District. See Acts 44th Leg., 1st C.S. 1935, ch. 368 §§ 5, 6.

Drainage Dist. v. *Board of County Comm'rs*, 336 U. S. 957 (1949); *Martha Bright Farms, Inc.* v. *Davis*, 293 U. S. 531 (1934); *Board of Comm'rs* v. *Ohio ex rel. Bowman*, 286 U. S. 526 (1932); *Milheim* v. *Moffat Tunnel Impr. Dist.*, 262 U. S. 710 (1923); *Miller & Lux, Inc.* v. *Sacramento & San Juaquin Drainage Dist.*, 256 U. S. 129 (1921).

WHEREFORE, Appellees respectfully move that this appeal be dismissed or, in the alternative, that the judgment of the Court of Civil Appeals be affirmed.

Respectfully submitted,

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